

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 674 of 1979

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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POPAT NATHA KORAT PATEL

Versus

DAMJI JADAV KUMBHAR

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Appearance:

MR SP DAVE for appellant

MR RN SHAH for Respondent

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CORAM : MR.JUSTICE J.M.PANCHAL

Date of decision: 07/11/96

ORAL JUDGEMENT

By means of filing this appeal under section 96 of the Code of Civil Procedure,1908, the appellant has questioned legality and validity of judgment and decree dated December 26,1978, rendered by the learned Civil Judge (S.D.), Junagadh, in Special Civil Suit no.135/74 by which suit filed by the respondent for specific

performance of agreement to sell dated March 6,1972 is dismissed, but alternative prayer to direct the appellant to pay back Rs.19,000/- paid as earnest money by the respondent to the appellant, is decreed.

2. The respondent, who is original plaintiff, is resident of village Dhava, Taluka : Talala, District : Junagadh and is doing agricultural work. The appellant, who is original defendant, is also resident of village Dhava and doing agricultural work. On March 6,1972, a registered agreement to sell land bearing survey no.140, admeasuring 7 Acres & 18 Gunthas situated at village Dhava for a consideration of Rs.25,000/- was executed by the appellant in favour of the respondent. The recitals made in the Deed indicate that the respondent had paid an amount of Rs.19,000/- in cash to the appellant by way of earnest money and remaining amount of Rs.6,000/- was to be paid at the time of execution of the sale deed. As per the agreement the possession of the land was also to be handed over to the respondent at the time of execution of sale deed. The case of the respondent was that he was ready and willing to perform his part of the contract, but the appellant refused to execute sale deed in favour of the respondent. The respondent, therefore, addressed a notice dated November 28,1974 and called upon the appellant to execute the sale deed and accept Rs.6,000/-. However, the appellant did not reply the notice served by the respondent. Under the circumstances, the respondent instituted Special Civil Suit no.135/74 in the Court of learned Civil Judge (S.D.), Junagadh and prayed the Court to pass decree for specific performance of registered agreement to sell dated March 6,1972. In the alternative, the respondent also prayed to pass decree against the appellant for an amount of Rs.19,000/- with interest.

3. The appellant contested the suit by filing written statement at exh.8 and controverted the averments made in the plaint. It was stated in the written statement that father of the respondent was doing money lending business without licence and as the appellant was not in a position to repay the amount of Rs.9,000/- taken by way of loan from the father of the respondent, agreement to sell was got executed under duress and coercion and, therefore, the respondent was not entitled to specific performance of agreement to sell. What was emphasised in the written statement was that on the date of execution of registered agreement to sell dated March 6,1972 the appellant was not paid anything by way of earnest money and, therefore, alternative prayer made by

the respondent also deserved to be rejected.

4. The learned Judge framed necessary issues for determination at exh.9. The respondent examined himself at exh.25 in support of the case pleaded in the plaint. The appellant examined himself at exh.30 and Bhavan Purshottam at exh.40 to prove his case pleaded in the written statement. The parties also produced documentary evidence in support of their respective claims.

5. After appreciating the evidence led by the parties, the Trial Court concluded that the appellant had executed registered agreement to sell survey no.140, admeasuring 7 acres & 18 gunthas of village Dhava for consideration of Rs.25,000/- on March 6,1972. The learned Judge also held that the respondent had paid an amount of Rs.19,000/- to the appellant by way of earnest money at the time of execution of agreement to sell. The case pleaded by the appellant that father of the respondent had advanced loan of Rs.9,000/- to the appellant and got the suit agreement executed by way of security for repayment of loan advanced was disbelieved by the Trial Court. The Trial Court found that the disputed property is joint family property of the appellant, his son and mother and the appellant had no right to sell the same. Having regard to the facts of the case, the Trial Court concluded that the respondent was not entitled to the relief of specific performance of agreement to sell dated March 6, 1972. However, the learned Judge held that the respondent was entitled to alternative relief of refund of Rs.19,000/paid by him as earnest money with interest. In view of these conclusions, the Trial Court dismissed the suit for specific performance of agreement to sell dated March 6,1972, but passed decree against the appellant directing him to pay an amount of Rs.19,000/with 6% interest thereon from the date of suit till realisation by judgment and order dated December 26,1978, giving rise to the present appellant.

6. Placing reliance on the deposition of Bhavan Purshottam, exh.42, the learned Counsel for the appellant submitted that the respondent having failed to prove that he had paid an amount of Rs.19,000/- to the appellant by way of earnest money at the time of execution of agreement to sell, decree passed by the Trial Court deserves to be set aside. It was pleaded that in fact, the appellant had taken a loan of Rs.9,000/- from the father of the respondent, but as the loan could not be repaid, undue advantage of illiteracy of the appellant was taken by the father of the respondent and agreement

to sell dated March 6,1972 was got executed under duress and coercion and, therefore, the decree passed by the Trial Court deserves to be set aside.

7. Mr. R.N.Shan, learned Counsel for the respondent submitted that after taking into consideration the recitals of registered agreement to sell dated March 6,1972 and other evidence adduced by the parties, the Trial Court has recorded a finding of fact that the respondent had paid an amount of Rs.19,000/- to the appellant by way of earnest money and, therefore, decree passed by the Trial Court being just and legal, should not be interfered with by the Court in the present appeal. What was emphasised on behalf of the respondent was that the suit notice served by the respondent on the appellant was never replied by the respondent and in view of consistent evidence led by the appellant, the appeal deserves to be dismissed.

8. It is relevant to notice that though the Trial Court has passed decree for an amount of Rs.19,000/- with 6% interest against the appellant, the appeal is restricted to only Rs.10,000/-, as the appellant has paid court fees only on an amount of Rs.10,000/-. The evidence of the respondent which is recorded at exh.25 indicates that registered agreement to sell was executed in the office of Sub-Registrar, Veraval on March 6,1972. It further shows that necessary stamp paper was purchased by Amargiri Mahadevgiri on behalf of the appellant and and it was written by M.R. Bhagdeve, who was petition writer. The respondent has clearly stated in his evidence that at the time of execution of agreement to sell dated March 6,1972 he had paid an amount of Rs.19,000/- to the appellant by way of earnest money. The respondent has produced notice which was served by him on the appellant prior to the filing of the suit at exh.27. In the said notice also it was asserted by the respondent that he had made payment of Rs.19,000/- to the appellant as earnest money on the date of execution of agreement to sell. Though this notice was duly received by the appellant, the appellant did not care to reply the same.

9. So far as registered agreement to sell is concerned, the appellant has admitted that it was signed by him. Therefore, recitals made in the registered agreement to sell can be referred to for the purpose of deciding question whether an amount of Rs.19,000/- was received by the appellant as earnest money at the time of execution of the deed. The recital in a deed is evidence against the parties who make it though it is no evidence

as against third parties. It is relevant to note that till the filing of the written statement, the appellant had never challenged legality of registered agreement to sell. The appellant had not applied to the Court for rescission of registered agreement to sell. Therefore, recitals made in the deed become relevant. The recitals would be a piece of admissible evidence and will have to be taken into consideration. Having regard to the nature of evidence adduced by the parties, I am of the opinion that the recitals made in the deed to the effect that the appellant was paid an amount of Rs.19,000/- by way of earnest money at the time of execution of agreement to sell is correct and there is no reason to disbelieve the said recital. In the written statement the appellant claimed that he had taken loan of Rs.9,000/- from the father of the respondent, but as he could not repay the said amount, agreement to sell the disputed land was got executed from him under duress and coercion. In his substantive evidence recorded on oath before Court, the appellant stated that father of the respondent had informed him that an amount of Rs.8,000/- was due and payable by the appellant to the father of the respondent. He has further stated that thereafter he had gone to take another loan of Rs.1,000/- from the father of the respondent. Thus, there is variance between the pleadings of the appellant and his evidence, which is recorded on oath before Court. Apart from this variance, the case that the appellant had taken loan of Rs.9,000/- from the father of the respondent does not appear to be correct because if, in fact, father of the respondent had lent an amount of Rs.9,000/- to the appellant, father of the respondent would not have failed to get some document executed in his favour from the appellant, such as Promissory Note etc. In view of the recitals made in the registered agreement to sell, presumption would arise that consideration mentioned therein had passed to the appellant. Having regard to the inconsistency in pleadings and evidence of the appellant, the testimony of witness Bhovan Purshottam exh.42 is of no assistance to the appellant. Though witness Bhovan Purshottam has stated that at the time of execution of agreement to sell dated March 6, 1972 earnest money as claimed by the respondent was never paid by the respondent to the appellant, the Trial Court which had advantage of observing demeanour of the witness, has rightly disbelieved him. This witness has gone to the extent of saying that the appellant had never agreed to sell the disputed property and at the time of preparing the agreement, the appellant was not present, but was sitting outside the office of Stamp Vendor. The appellant himself has not stated in his evidence that at

the time when the document was being executed, he was not present and was sitting outside the office of Stamp Vendor. Though the witness had asserted before the Court that the respondent was doing money lending business, he could not produce any evidence to substantiate his said say. Cross-examination of this witness on behalf of the respondent makes it abundantly clear that he is on inimical terms with the respondent. On the facts and in the circumstances of the case, it cannot be said that any error is committed by the Trial Court in not placing reliance on the deposition of this witness. On appreciation of the evidence adduced by the parties, the learned Judge has recorded a finding of fact that registered agreement to sell was executed by the appellant, but relief claimed by the respondent for specific performance of the said contract was refused as the property was found to be ancestral property. On the facts and in the circumstances of the case, it cannot be said that any error is committed by the learned Judge in coming to the conclusion that the respondent proved that he had paid an amount of Rs.19,000/- to the appellant at the time of execution of registered agreement to sell. It is not pointed out to the Court that the evidence adduced by the parties is erroneously appreciated by the Trial Court. As the Trial Court found that the appellant was paid an amount of Rs.19,000/- by way of earnest money at the time of execution of registered agreement to sell, the Trial Court was justified in passing decree against the appellant for an amount of Rs.19,000/- with 6% interest per annum thereon. I do not find any illegality in the decree passed by the Trial Court and, therefore, the appeal is liable to be dismissed.

For the foregoing reasons, the appeal fails and is dismissed, with no order as to costs.

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